FEB 22 1979
..., JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-690

KATHLEEN R. REITER,

Petitioner,

vs.

SONOTONE CORPORATION, et al.,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND AND PROVIDENCE PLANTATIONS, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, WYOMING AND THE COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA AND VIRGINIA, AS *AMICI CURIAE*

WARREN SPANNAUS
Attorney General
RICHARD B. ALLYN
Solicitor General
ALAN H. MACLIN
Chief, Antitrust Division
STEPHEN P. KILGRIFF
Special Assistant
Attorney General
THOMAS KENYON
Special Assistant
Attorney General
720 American Center Building
St. Paul, Minnesota 55101
Attorneys for State of Minnesota

JOHN ASHCROFT
Attorney General
ROGER BERN
Chief Counsel, Antitrust Division
WALTER O. THEISS
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
Attorneys for State of Missouri

(Additional List of Counsel on Inside Cover)

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

CHARLES A. GRADDICK
Attorney General
THOMAS T. ZIEMAN, JR.
Chief, Antitrust Section
250 Administrative Building
Montgomery, Alabama 36130
Attorneys for State of Alabama

AVRUM M. GROSS
Attorney General
MARK E. ASHBURN
Assistant Attorney General
420 L Street
Suite 100
Anchorage, Alaska 99501
Attorneys for State of Alaska

ROBERT K. CORBIN
Attorney General
KENNETH R. REED
Chief Counsel
Antitrust Division
126 State Capitol Building
Phoenix, Arizona 85007
Attorneys for State of Arizona

STEVE CLARK
Attorney General
ROYCE O. GRIFFIN, JR.
Deputy Attorney General
Chief, Antitrust Division
122 National Old Line Building
Little Rock, Arkansas 72201
Attorneys for State of Arkansas

GEORGE DEUKMEJIAN
Attorney General
WARREN J. ABBOTT
Assistant Attorney General
LINDA L. TEDESCHI
Deputy Attorney General
Department of Justice
3580 Wilshire Boulevard
Los Angeles, California 90010
Attorneys for State of California

J.D. MacFARLANE
Attorney General
B. LAWRENCE THEIS
First Assistant Attorney General
Antitrust Section
WILLIAM E. WALTERS
Assistant Attorney General
1525 Sherman Street
Denver, Colorado 80203
Attorneys for State of Colorado

CARL R. AJELLO
Attorney General
GERARD J. DOWLING
Assistant Attorney General
LARRY H. EVANS
Assistant Attorney General
30 Trinity Street
Post Office Box 120
Hartford, Connecticut 06115
Attorneys for State of Connecticut

RICHARD S. GEBELEIN
Attorney General
WILLIAM E. KIRK, III
Assistant Attorney General
State Office Building
Wilmington, Delaware 19801
Attorneys for State of Delaware

JIM SMITH
Attorney General
CHARLES R. RANSON
Special Assistant Attorney General
DOUGLAS C. KEARNEY
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, Florida 32304
Attorneys for State of Florida

WAYNE MINAMI
Attorney General
THOMAS T. WOOD
Deputy Attorney General
225 Queen Street
Suite 402
Honolulu, Hawaii 96813
Attorneys for State of Hawaii

DAVID H. LEROY
Attorney General
MIKE BRASSEY
Deputy Attorney General
Chief, Business Regulation Division
State House
Boise, Idaho 83720
Attorneys for State of Idaho

WILLIAM J. SCOTT
Attorney General
JOHN E. NOEL
Chief, Antitrust Division
188 West Randolph Street
Suite 2118
Chicago, Illinois 60601
Attorneys for State of Illinois

THEODORE L. SENDAK
Attorney General
219 State House
Indianapolis, Indiana 46204
Attorney for State of Indiana

THOMAS J. MILLER
Attorney General
GARY H. SWANSON
Assistant Attorney General
Antitrust Division
State Capitol
Des Moines, Iowa 50319
Attorneys for State of Iowa

ROBERT T. STEPHAN
Attorney General
WAYNE E. HUNDLEY
Deputy Attorney General
Chief, Antitrust Division
Kansas Judicial Center
Topeka, Kansas 66612
Attorneys for State of Kansas

ROBERT F. STEPHENS
Attorney General
JAMES M. RINGO
Assistant Attorney General
Antitrust Division
Frankfort, Kentucky 40601
Attorneys for Commonwealth of Kentucky

WILLIAM J. GUSTE, JR.
Attorney General
JOHN R. FLOWERS, JR.
Assistant Attorney General
Chief, Antitrust Section
2-3-4 Loyola Building
New Orleans, Louisiana 70112
Attorneys for State of Louisiana

RICHARD S. COHEN
Attorney General
CHERYL HARRINGTON
Assistant Attorney General
State House
Augusta, Maine 04333
Attorneys for State of Maine

STEPHEN H. SACHS
Attorney General
CHARLES O. MONK, II
Assistant Attorney General
Chief, Antitrust Division
One South Calvert Street
Baltimore, Maryland 21202
Attorneys for State of Maryland

FRANCIS X. BELLOTTI
Attorney General
PAULA W. GOLD
Assistant Attorney General
Chief, Public Protection Bureau
STEVEN J. GREENFOGEL
Chief, Antitrust Division
One Ashburton Place
Boston, Massachusetts 02108
Attorneys for State of Massachusetts

FRANK J. KELLEY
Attorney General
EDWIN M. BLADEN
Assistant Attorney General
Consumer Protection and Antitrust Division
525 West Ottawa Street
Lansing, Michigan 48913
Attorneys for State of Michigan

A.F. SUMMER
Attorney General
MARSHALL G. BENNETT
Assistant Attorney General
Department of Justice
Jackson, Mississippi 39205
Attorneys for State of Mississippi

MIKE T. GREELY
Attorney General
JEROME J. CATE
Assistant Attorney General
Capitol Station
Helena, Montana 59601
Attorneys for State of Montana

PAUL L. DOUGLAS
Attorney General
ROBERT F. BARTLE
Assistant Attorney General
Antitrust Division
PAUL E. HOFMEISTER
Assistant Attorney General
Antitrust Division
State Capitol
Lincoln, Nebraska 68509
Attorneys for State of Nebraska

RICHARD H. BRYAN
Attorney General
Capitol Complex
Carson City, Nevada 89710
Attorney for State of Nevada

THOMAS D. RATH
Attorney General
EDWARD E. LAWSON
Antitrust Counsel
State House Annex
Concord, New Hampshire 03301
Attorneys for State of New Hampshire

JOHN J. DEGNAN
Attorney General
ALFRED J. LUCIANI
Chief, Antitrust Section
13 Roszel Road
Princeton, New Jersey 08540
Attorneys for State of New Jersey

JEFF BINGHAM
Attorney General
JAMES J. WECHSLER
Assistant Attorney General
Post Office Drawer 1508
Santa Fe, New Mexico 87501
Attorneys for State of New Mexico

ROBERT ABRAMS
Attorney General
JOHN M. DESIDERIO
Assistant Attorney General
Chief, Anti-Monopolies Bureau
Two World Trade Center
New York, New York 10047
Attorneys for State of New York

RUFUS L. EDMISTEN
Attorney General
HOWARD A. KRAMER
Deputy Attorney General
for Legal Affairs
DAVID S. CRUMP
Special Deputy Attorney General
Antitrust Division
Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Attorneys for State of North Carolina

ALLEN I. OLSON
Attorney General
DALE V. SANDSTROM
Assistant Attorney General
Chief, Consumer Fraud
and Antitrust Division
TERRY L. ADKINS
Assistant Attorney General
State Capitol
Bismarck, North Dakota 58505
Attorneys for State of North Dakota

WILLIAM J. BROWN
Attorney General
EUGENE F. McSHANE
Assistant Attorney General
Chief, Antitrust Section
RICHARD M. FIRESTONE
Assistant Attorney General
Suite 1700, LeVeque Tower
50 West Broad Street
Columbus, Ohio 43215
Attorneys for State of Ohio

JAN ERIC CARTWRIGHT
Attorney General
MANVILLE J. BUFORD
Assistant Attorney General
Chief, Civil Division
112 State Capitol
Oklahoma City, Oklahoma 73105
Attorneys for State of Oklahoma

JAMES A. REDDEN
Attorney General
JAMES KIRKHAM JOHNS
Chief Counsel
Antitrust Division
100 State Office Building
Salem, Oregon 97310
Attorneys for State of Oregon

EDWARD G. BIESTER, JR.
Attorney General
NORMAN J. WATKINS
Deputy Attorney General
Chief, Civil Litigation
JOHN L. SHEARBURN
Deputy Attorney General
Antitrust Division
Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17120
Attorneys for Commonwealth of Pennsylvania

DENNIS J. ROBERTS, II
Attorney General
PATRICK J. QUINLAN
Special Assistant Attorney General
Providence County Courthouse
Providence, Rhode Island 02903
Attorneys for State of Rhode Island and Providence Plantations

DANIEL R. McLEOD
Attorney General
JOHN M. COX
Staff Attorney
Hampton Office Building
Columbia, South Carolina 29211
Attorneys for State of South Carolina

MARK V. MEIERHENRY
Attorney General
JAMES E. McMAHON
Assistant Attorney General
State Capitol
Pierre, South Dakota 57501
Attorneys for State of South Dakota

WILLIAM M. LEECH, JR.
Attorney General
WILLIAM J. HAYNES, JR.
Deputy Attorney General
450 James Robertson Parkway
Nashville, Tennessee 37219
Attorneys for State of Tennessee

MARK WHITE
Attorney General
DAVID BRAGG
Chief, Consumer Protection
and Antitrust Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711
Attorneys for State of Texas

ROBERT B. HANSEN
Attorney General
ANDREW W. BUFFMIRE
Assistant Attorney General
Chief, Antitrust Division
419 Boston Building
Salt Lake City, Utah 84111
Attorneys for State of Utah

M. JEROME DIAMOND
Attorney General
JAY I. ASHMAN
Assistant Attorney General
Pavilion Building
109 State Street
Montpelier, Vermont 05602
Attorneys for State of Vermont

MARSHALL COLEMAN
Attorney General
JOSEPH W. KAESTNER
Assistant Attorney General
Antitrust Unit
Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
Attorneys for Commonwealth of Virginia

SLADE GORTON
Attorney General
THOMAS L. BOEDER
Senior Assistant Attorney General
EARLE J. HEREFORD, JR.
Assistant Attorney General
Consumer Protection and Antitrust Division
1366 Dexter Horton Building
Seattle, Washington 98104
Attorneys for State of Washington

CHAUNCEY H. BROWNING, JR.
Attorney General
CHARLES G. BROWN
Deputy Attorney General
Director, Antitrust Division
State Capitol
Charleston, West Virginia 25305
Attorneys for State of West Virginia

BRONSON C. La FOLLETTE
Attorney General
MICHAEL L. ZALESKI
Assistant Attorney General
Antitrust Division
114 East State Capitol
Madison, Wisconsin 53702
Attorneys for State of Wisconsin

JOHN D. TROUGHTON
Attorney General
PETER J. MULVANEY
Deputy Attorney General
Civil Division
JAMES W. GUSEA
Assistant Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
Attorneys for State of Wyoming

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H. Thorelli, The Federal Antitrust Policy (1954) 9
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This brief *amici curiae* is submitted by Forty-Nine States pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

Whether a consumer who purchases a product or service for a nonbusiness (personal) use at a higher price because of an antitrust violation suffers injury to his or her "business or property" within the meaning of section 4 of the Clayton Act, 15 U.S.C. § 15 (1976).

INTEREST OF *AMICI CURIAE*

The *amici* States are interested in this proceeding by virtue of the States' duty to protect the general welfare of their citizens and their role in encouraging and fostering the national economic policy of free competition embodied in the federal and state antitrust laws.

The decision of the court of appeals, denying standing under section 4 of the Clayton Act to nonbusiness consumers, uniquely affects the *amici* States by threatening the *parens patriae* authority recently granted to the States by Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976). The Act provides for the filing of civil damage actions by state attorneys general as *parens patriae* for natural persons injured in their property by violations of the antitrust laws. According to the Eighth Circuit, however, nonbusiness consumers—essentially the class of persons intended to be protected by the *parens patriae* provisions—do not have standing to sue under section 4. If the decision of the Eighth Circuit is affirmed, the right of nonbusiness consumers to recover on their own behalf will be denied. If the *parens patriae* authority of state attorneys general is interpreted to depend on the preexistence of standing for the natural persons represented, it will also be jeopardized.

Moreover, the court of appeals' decision challenges the *amici* States' ability to bring federal treble-damage class actions on behalf of nonbusiness consumers. In the past, the rights of injured consumers have been successfully vindicated in such actions. *See, e.g., In re Antibiotic Antitrust Actions,* M.D.L. No. 10 (S.D.N.Y., consol. Oct. 21, 1968). The decision may also inhibit the *amici* States and their political subdivisions from bringing federal treble-damage actions on their own behalf as large purchasers of a multitude of goods and services because, in some cases, it may be argued they have not been injured in their "business or property" in a "commercial" sense under the strained interpretation given these terms by the Eighth Circuit.

ARGUMENT

I. STANDING FOR NONBUSINESS CONSUMERS IS CONFERRED BY THE STATUTORY LANGUAGE OF SECTION 4.

A. "Any Person" May Recover for Injury to Property Resulting from a Purchase for a Nonbusiness Purpose

Denial of standing to nonbusiness consumers would create a distinction which is contrary to the plain meaning of the statute. Section 4 of the Clayton Act provides a damage remedy for "[a]ny person who shall be injured in his business or property" by a violation of the antitrust laws. The statute grants a right of recovery to "any person" suffering the requisite injury. "The statute does not confine its protection to consumers, or to purchasers, or to competitors or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

The requisite injury required is injury to "business *or* property." The language adopted by Congress is disjunctive, expressing a clear intent to allow recovery for injuries to property as distinguished from injuries to business.[1] Limiting re-

[1] "Property" has been defined as "the exclusive right to possess, enjoy, and dispose of a thing." Webster's Third New International Dictionary 1818 (1976). It is a separate and more extensive term than "business." *See, e.g.*, Utah Gas Pipelines Corp. v. El Paso Natural Gas Co., 233 F. Supp. 955, 964 (D. Utah 1964) ("Even though there [was] no 'business' subject to injury, injury to plaintiff's property would be actionable . . . ."); Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964) ("The word 'property' has wider scope and is more extensive than the word 'business.' Less is required to prove 'property' than to prove 'business.' ").

covery to injuries resulting from purchases for business purposes would eliminate the words "or property" from the statute. Such a limitation would violate a principal maxim of statutory construction—that Congress intends each word in a statute to have an independent meaning and that, if it can be prevented, no clause or word should be considered superfluous. *See, e.g., Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307-08 (1961).

B. Injury to "Property' Includes Personal Monetary Loss

A clear exposition of the meaning of the term "property" was given in *Chattanooga Foundry and Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). There, the city of Atlanta purchased iron pipe for use in the city waterworks. The city brought suit to recover damages caused by defendant's illegal arrangements which resulted in a price "much above what was reasonable or the pipe was worth." *Id.* at 395.

This court, through Justice Holmes, held that "[The city of Atlanta] was injured *in its property*, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe. *A person whose property is diminished by payment of money wrongfully induced is injured in his property.*" *Id.* at 396 (emphasis added).[2] In discussing the specific right granted by Congress, Justice Holmes noted that "Congress had power to give an action for damages to an individual who suffers by breach of the [antitrust] law. . . .

[2] This language makes it clear that there is no support for the Eighth Circuit's view that "the city's claim arguably sought recovery for a business injury." Reiter v. Sonotone Corp., 579 F.2d 1077, 1082 (8th Cir. 1978). Even if the overcharge could have been interpreted as damage to the city's business, this Court did not reach that issue in *Chattanooga* because damage to the city's property was sufficient for purposes of standing.

The damage complained of must almost or quite always be damage in property, that is, in the money of the plaintiff. . . ." *Id.* at 396-97 (emphasis added).

In *Chattanooga*, this Court gave a broad interpretation to the word "property." The Court's language does not merely suggest, but stands for the proposition that anyone, such as the plaintiff in this case, forced to pay more for a product by virtue of anticompetitive activity suffers injury to his or her property. The continued vitality of *Chattanooga* has been reaffirmed in recent years. *See, e.g., Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262 n.14 (1972) (a state, as a "consumer in the market place," suffers an actionable injury "through a 'payment of money wrongfully induced' "); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 491 (1968) ("the victim of an overcharge is damaged within the meaning of § 4 to the extent of that overcharge").

II. THE LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS INTENDED TO GRANT STANDING TO NONBUSINESS CONSUMERS.

In *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), this Court examined the legislative history of section 4 of the Clayton Act and its predecessor, section 7 of the Sherman Act.[3] As noted by this Court, the Sherman Act "was conceived of primarily as a remedy for '[t]he people of the United States as individuals,' especially consumers," and the damage provisions of the Clayton Act "were conceived primarily as 'open[ing] the door of justice to every man . . .

[3] Section 4 of the Clayton Act, 15 U.S.C. § 15, was enacted in 1914 as the reenactment, without substantive change, of section 7 of the Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890). *See* S. Rep. No. 698, 63rd Cong., 2d Sess. 45 (1914).

and giv[ing] the injured party ample damages for the wrong suffered.' " *Id.* at 486 n.10.

As this Court's analysis in *Brunswick* suggests, the legislative histories of the Clayton and the Sherman Acts manifest the Congressional intent to grant standing to ordinary (nonbusiness) consumers, *see, e.g.*, 21 Cong. Rec. 1767-68, 2569, 2615, 2640, 3146-50 (1890); 51 Cong. Rec. 9073, 9198, 9270, 12939 (1914), although several Congressmen questioned the practicality and economic feasibility of consumer suits. *See, e.g.*, 21 Cong. Rec. at 2564 (Sen. Reagan), 2571 (Sen. Hiscock), 3146 (Sen. Reagan), 3150 (Sen. George) (only "rich men" or "men of spirit" were expected to contest illegal combinations).[4] Treble damages were provided and the jurisdictional amount in controversy requirement was eliminated to

[4] The Eighth Circuit cites the remarks of Senator George, 21 Cong. Rec. at 1767-68, 3147-48, 3150; Senator Hiscock, *id.* at 2571; and Senator Reagan, *id.* at 2564, as supporting its interpretation of the legislative history. 579 F.2d at 1080. Contrary to the circuit court's analysis, all three of these senators recognized that consumers had standing but questioned whether consumers would actually sue. Senator George proposed a class action remedy because "not one suit would ever be brought . . . by any person who is simply damaged in his character as a consumer" and, therefore, "the bill, so far as they are concerned [would] be a snare and a mere delusion." 21 Cong. Rec. at 3150. Senator Hiscock felt that "the consumer of the merchandise . . . had the right to follow [a] combination . . . and recover . . . damages," but would be unlikely to do so. *Id.* at 2571. Senator Reagan felt that "the great mass of people would not be able to employ counsel and go with witnesses to the circuit court" and, thus, "the remedy as presented [would be] inadequate." *Id.* at 2564.

The circuit court also cites the remarks of Senator Morgan, *id.* at 3149, as indicating an "[intent] to limit the class of persons able to bring a private damage action." 579 F.2d at 1080. In the discussion cited by the circuit court, Senator Morgan stated his opposition to *any* private damage remedy. Even though Senator Morgan opposed any private damage remedy, his comments concerning the Judiciary version indicated his belief that consumers had standing. "[W]e have gone further and given a personal remedy, to whoever may be injured in his business or property." 21 Cong. Rec. at 3149.

enable "persons who had suffered in a minor degree" to sue. *Id.* at 2612.

In contrast to this Court's analysis, the Eighth Circuit argues that when the Senate Judiciary Committee replaced Senator Sherman's original language "any person or corporation injured or damnified" with "any person . . . injured in his business or property," the Committee intended to preclude suits by nonbusiness consumers. The circuit court admits that "ordinary consumers arguably would have been included in if not encouraged by the bill as originally introduced"[5] and then relies on the change in the language itself as proof of Congressional intent to exclude "ordinary consumers" from the class of persons granted standing.[6]

The legislative history, however, gives no indication that the change in language was intended to restrict the class of

[5] 579 F.2d at 1080. Discussion during the Senate debate on the original bill makes it clear that "ordinary consumers" (nonbusiness consumers) were to have standing to sue:

> The right of action against the persons in the combination is given to the party damnified. Who is the party injured, when, as prescribed in the bill, there has been an advance in the price by the combination? . . . The consumer is the party "damnified or injured."
>
> . . . .
>
> Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advance by the combination.

21 Cong. Rec. 1767-68 (1890) (remarks of Sen. George). In addition, references were made throughout the Senate debates to recovery for damages resulting from overcharges for various commodities which would be commonly purchased by nonbusiness consumers. The commodities mentioned included: beef, *id.* at 2470 (Sen. Allison), 2640 (Sen. Spooner); flour, *id.* at 2730 (Sen. Platt); molasses, *id.* at 2610 (Sen. Morgan); sugar, *id.* at 1768 (Sen. George), 2568 (Sen. Sherman), 2615 (Sen. Coke); "necessaries of life," *id.* at 1768 (Sen. George), 2461 (Sen. Sherman).

[6] Because the Eighth Circuit is forced to conclude that the legislative history provides an "inconclusive explanation" for the change, it is forced to rely on the change in language itself. 579 F.2d at 1080.

persons entitled to sue; to the contrary, Congress recognized the right of consumers to sue both before and after the bill emerged from the Senate Judiciary Committee. *Compare, e.g.,* 21 Cong. Rec. at 1767-68, 2569, 2571, 2615 *with id.* at 3146-50. That the bill was not substantively changed was emphasized by the comments made by Senator Hoar, the author of section 7 of the Committee version, when he introduced the Committee version to the Senate: "I shall not undertake to explain the bill, which is well understood."[7] If section 7 had been changed to deny standing to "ordinary consumers," an explanation certainly would have been given to the entire Senate. During the same discussion Senator Edmunds, also a member of the Judiciary Committee, noted that the Committee sought to use "terms that were well known to the law already."[8] The terminology used, as previously noted, clearly indicates that nonbusiness consumers were granted standing to sue for injuries to their property.

The Judiciary Committee's substitution of treble damages for double damages indicates that the Committee intended to strengthen and not weaken consumer standing. Moreover, the only debate on the Committee's draft concerned the possibility

[7] 21 Cong. Rec. 3145 (1890). The Judiciary Committee included Senators Coke, Edmunds, Evarts (New York), George, Hoar, Ingalls, Pugh, Vest, and Wilson (Iowa). While there is disagreement as to who authored various sections of the Judiciary Committee version, the authorities agree that Senator Hoar was the author of at least section 7. *See, e.g.,* J. Clark, The Federal Trust Policy 43 (1931); H. Thorelli, The Federal Antitrust Policy 212 (1954). The statement of Senator Hoar, as a member of the Committee and as the author of section 7, is entitled to considerable weight. *See, e.g.,* Wright v. Vinton Branch Bank, 300 U.S. 440, 463-64 (1937).

[8] 21 Cong. Rec. 3148 (1890). The Committee's concern for the specific language used makes it clear that language excluding recovery by nonbusiness consumers would have been used, had that been the Committee's intent.

of further strengthening consumer incentives to sue via a class action device.[9]

The Eighth Circuit also bases its decision on the legislative history of section 4 of the Clayton Act which adopted the "any person . . . injured in his business or property" langauge of section 7 of the Sherman Act.[10] The circuit court argues that, because the primary purpose of the Clayton Act was to protect small businesses, nonbusiness consumers were not meant to have standing. However, the court is unable to cite any legislative history indicating that the protection of small businesses was the sole intent of Congress. In fact, the legislative history supports the existence of consumer standing. *See, e.g.*, 51 Cong. Rec. 9073, 9198, 9270, 12939 (1914). The court also fails to recognize that many antitrust violators sell to both business and nonbusiness purchasers and that giving standing to nonbusiness purchasers will, in many cases, contribute to the protection of small businesses. *Cf. Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978) (interpreting section 4 to grant standing to foreign governments).

The court of appeals' interpretation of the legislative history defeats the Congressional purpose of providing "a remedy for '[t]he people of the United States as individuals,'

[9] *Id.* at 3147-51. This proposal was made by Senator George who was skeptical of the claim that treble damages would evoke consumer litigation. His concern centered on "the practical rather than theoretical obstacles to consumer actions," as recognized by the Eighth Circuit. 579 F.2d at 1080 n.6. The circuit court fails, however, to reconcile its recognition of this distinction with its conclusion, based on Senator George's remarks, that "Congress neglected or intentionally excluded" consumers. *Id.* at 1080.

[10] The Eighth Circuit recognizes that "Congress, by its enactment [of section 4 of the Clayton Act], did not intend to amend the Sherman Act." 579 F.2d at 1080. Thus, because standing for nonbusiness consumers existed under the Sherman Act, Congress intended it to exist under the Clayton Act.

especially consumers." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977). As succinctly stated by Judge Nickerson when confronted by the issue currently before this Court, "it would seem anomalous to read the Clayton Act to exclude an action by the very persons sought to be protected." *Theophil v. Sheller-Globe Corp.*, 446 F. Supp. 131, 135 (E.D.N.Y. 1978), *appeal dismissed*, No. 78-7389 (2d Cir. Jan. 3, 1979).

III. DECISIONS OF THIS COURT SUPPORT THE EXISTENCE OF STANDING FOR NONBUSINESS CONSUMERS.

A. Recent Decisions of This Court Recognize the Standing of Nonbusiness Consumers

Recent decisions of this Court have consistently recognized the existence of standing for nonbusiness consumers. Two decisions of particular significance are *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) and *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972). In *Goldfarb*, retail purchasers of private homes (clearly nonbusiness consumers) challenged, under sections 4 and 16 of the Clayton Act, a minimum-fee schedule established by a bar association for title searches. In holding that the use of the minimum-fee schedule constituted illegal price fixing, this Court made repeated references to consumers.[11] In light of the facts of the case, these references can

[11] 421 U.S. at 782 ("[I]n terms of restraining competition and harming *consumers* like petitioners the price-fixing activities found here are unusually damaging. . . . [because] *consumers* [can] not turn to alternative sources for the necessary service.") (emphasis added), 783 ("These factors coalesced to create a pricing system that *consumers* could not realistically escape.") (emphasis added), 792 ("[The State Bar's] activities resulted in a rigid

only be taken to refer to nonbusiness purchases of homes.[12]

In *Hawaii*, the State of Hawaii sought to recover damages in its proprietary capacity for overcharges paid for petroleum products it had purchased *and* for damages to its general economy. This Court held that, to prevent duplicative recoveries, Hawaii could not recover for injuries to its general economy because "consumers . . . may recover themselves under § 4." 405 U.S. at 264. Ordinary consumers could recover because "Congress [gave] private citizens rights of action for injunctive relief and damages for antitrust violations . . . ." *Id.* at 266. Hawaii could, however, recover for injuries suffered "in its capacity as a consumer in the marketplace, through a 'payment of money wrongfully induced.' " *Id.* at 262 n.14. In support of its decision, this Court noted that the United States could not recover for injury to its "business or property" "for general injury to the national economy . . . but only for those injuries suffered in its capacity as a consumer of goods and services." *Id.* at 265. Thus, private citizens, individual states, and the United States can recover as "consumers in the marketplace" for "payment of money wrongfully induced."

In addition to *Goldfarb* and *Hawaii*, other recent decisions of this Court have adverted to the right of consumers to sue for antitrust violations. *See, e.g., Pfizer Inc. v. Government of India*, 434 U.S. 308, 313-14 (1978) (foreign governments have

price floor from which petitioners, as *consumers*, could not escape if they wished to borrow money to buy a home.") (emphasis added).

[12] As the Eighth Circuit notes, 579 F.2d at 1087 n.18, this Court did not specifically address the issue of consumer standing in *Goldfarb*. However, this Court does not hesitate to raise, *sua sponte*, issues not addressed by the parties to a lawsuit. *See, e.g.*, Bellotti v. Baird, 428 U.S. 132, 143 n.10 (1976); City of Kenosha v. Bruno, 412 U.S. 507, 511-14 (1973).

standing to sue as consumers because the antitrust laws were not intended as a remedy for American consumers only); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 740-41 (1977) (standing of direct consumers implicitly recognized while denying the offensive use of the "pass-on" theory); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977) (legislative history of the Sherman Act indicates that it was designed primarily as a remedy for consumers); *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 494 (1968) (ultimate consumers have the right to sue, but are unlikely to do so). The terms "consumers" and "ultimate consumers" as used in these opinions include ordinary, nonbusiness consumers such as the plaintiff in this case.

B. The Purchaser of a Product or Service Has a "Commercial Interest"

In *Hawaii v. Standard Oil Co.*, this Court stated in dictum that "[l]ike the lower courts that have considered the meaning of the words 'business or property,' we conclude that they refer to commercial interests or enterprises." 405 U.S. 251, 264 (1972). The Eighth Circuit misconstrues this language to require a "commercial injury"[13] in the sense of a purchase for a "business" or "commercial" purpose. The court then relies on this erroneous construction to support its denial of standing for consumers purchasing products or services for nonbusiness purposes.

The factual situation in *Hawaii* makes it clear that the language used by this Court was not meant to distinguish between purchases for business and nonbusiness purposes, but to distinguish between damage to a state resulting from its purchase of a product or service in "commerce" and damage to a

[13] *Compare* 579 F.2d at 1083 *with id.* at 1084, 1086.

state's general economy resulting from damage to its citizens.[14] A state (or any consumer) has standing to recover when it is injured by its direct participation in a commercial transaction because it has a "commercial interest." A state cannot, however, recover for injuries to others which affect its general economy because the injured parties themselves, the parties with the necessary "commercial interest," may recover.

An ordinary consumer who participates in a commercial transaction satisfies the "commercial interest" requirement of *Hawaii*. The end use of the product or service being purchased is irrelevant. Every purchase, whether for a business or a nonbusiness purpose, has the same effect on the market per dollar spent. Both business and nonbusiness purchasers have the same effect on the interplay of the forces of supply and demand and on the allocation of society's resources. Both involve "commerce" and thus entail a "commercial interest." *See, e.g., Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787-88 (1975) ("the exchange of . . . a service for money is 'commerce' in the most common usage of the word").

The plaintiff in *Hawaii* (the state suing for injuries to its general economy) and the plaintiffs in the cases cited therein,[15] as well as the plaintiffs in the cases relied on by the

[14] *See* L. Sullivan, Handbook of the Law of Antitrust 771 n.3 (1977).

[15] In *Hawaii* this Court relied on Roseland v. Phister Mfg. Co., 125 F.2d 417 (7th Cir. 1942); Hamman v. United States, 267 F. Supp. 420 (D. Mont. 1967), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968); and Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F. Supp. 641 (D.N.J. 1960), for the proposition that "the words 'business or property' . . . refer to commercial interests or enterprises." 405 U.S. at 264. *Roseland* and *Morristown* precluded plaintiffs with mere "expectancies" of engaging in business from recovering damages for conspiracies alleged to impede them. *Hamman* precluded widows of employees killed while working for an employer engaged in an unreasonable restraint of trade from recovering for loss of consortium. The plaintiffs in these cases did not allege injuries suffered as consumers in the market place, i.e., as participants in commercial transactions.

Eighth Circuit,[16] were not injured as a result of their participation in a commercial transaction. This distinguishes these plaintiffs from a consumer in the market place, who has the necessary "commercial interest" by reason of his or her direct participation in a commercial transaction. As stated by Judge Larson in the well-reasoned district court opinion in this case, " 'commercial interests' clearly [encompass] the interest of consumers who must pay more in the marketplace because of defendants' actions." *Reiter v. Sonotone Corp.*, 435 F. Supp. 933, 936 (D. Minn. 1977), *rev'd*, 579 F.2d 1077 (8th Cir. 1978).

C. A "Competitive Injury" is Not Required for Standing

Intertwined with its "commercial interest" argument, the Eighth Circuit argues, based on *GAF Corp. v. Circle Floor Co.*, 463 F.2d 752 (2d Cir. 1972), *cert. dismissed*, 413 U.S. 901 (1973), that a "competitive injury" is required for standing under section 4. 579 F.2d at 1084. *GAF* involved an attempted corporate takeover with the target corporation alleging injury to its competitive position. A "competitive injury"

[16] In addition to *Hawaii*, the Eighth Circuit relies on Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172 (5th Cir. 1976); *In re* Multidist. Vehicle Air Pollution, 481 F.2d 122 (9th Cir.), *cert. denied*, 414 U.S. 1045 (1973); and Reibert v. Atlantic Richfield Co., 471 F.2d 727 (10th Cir.), *cert. denied*, 411 U.S. 938 (1973), as "limit [ing] standing to those engaged in commercial ventures and enterprises." 579 at 1084. All three of these cases rely on *Hawaii* and are readily distinguishable from the instant fact situation. *Vehicle Air Pollution* precluded recovery for tort injuries such as health problems caused by defendants' alleged conspiracy to withhold automobile air pollution control technology. *Reibert* precluded an employee from recovering for the loss of his job which was allegedly caused by an anticompetitive merger. The plaintiffs in *Vehicle Air Pollution* and *Reibert* were not suing for damages sustained as consumers in the market place, i.e., as participants in commercial transactions. In *Tugboat*, the court held that plaintiff unions *had* standing because they were in the business of representing employees who had a commercial interest.

would be required in this situation. This case does not stand for the proposition that a purchaser in the market place must suffer a "competitive injury" to sue under section 4.

Moreover, the Eighth Circuit confuses the policy behind the antitrust laws of preserving and protecting competition, *see, e.g., Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-93 (1940), with the standing requirements of section 4. Protection of competition does not require a plaintiff who has suffered injury to a competitive position; rather, granting standing to plaintiffs who may not have suffered a "competitive injury" will often contribute to the protection of competition. *Cf. Pfizer Inc. v. Government of India*, 434 U.S. 308, 314-15 (1978) (interpreting section 4 to grant standing to foreign governments).

IV. DENIAL OF STANDING TO NONBUSINESS CONSUMERS WOULD FRUSTRATE THE POLICIES UNDERLYING THE ANTITRUST LAWS.

This Court has repeatedly held that "[t]he Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," *Northern Pacific Railway v. United States*, 356 U.S. 1, 4 (1958), and has emphasized the existence of "a strong national interest in antitrust enforcement." *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 635 (1977). The right of nonbusiness consumers to sue for treble damages furthers this national policy of fostering competition by encouraging private parties to act in the national interest.[17]

[17] *See, e.g.*, Hawaii v. Standard Oil Co., 405 U.S. at 262 ("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general.' "); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969) ("[T]he purpose of giving private parties treble-damage and injunctive remedies was not merely to provide private relief, but was to serve as well the high purpose of enforcing the antitrust laws.").

Section 4 has been recognized as an effective supplement to government enforcement of the antitrust laws. *E.g., United States v. Borden Co.*, 347 U.S. 514, 518 (1954). Private suits are "one of the surest weapons for effective enforcement of the antitrust laws," *Minnesota Mining & Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965), because they create "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968).

Denial of standing to nonbusiness consumers would establish a judicially-created hiatus in the enforcement of the antitrust laws by rendering, at the very least, vertical and horizontal conspiracies aimed at *retail* purchasers immune from private damage actions. Clearly such an arbitrary gap is contrary to the policies of the antitrust laws. The antitrust laws were designed to "protect the victims of the forbidden practices as well as the public," *Radovich v. National Football League*, 352 U.S. 445, 454 (1957), and to "penaliz[e] wrongdoers and dete[r] wrongdoing." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977).

Last year while interpreting section 4 to grant standing to foreign governments, *Pfizer Inc. v. Government of India*, 434 U.S. 308 (1978), this Court stated that:

> § 4 has two purposes: to deter violators and deprive them of " 'the fruits of their illegality,' " and "to compensate victims of antitrust violations for their injuries." . . . To deny a foreign plaintiff injured by an antitrust vio-

> lation the right to sue would defeat these purposes. It would permit a price fixer or monopolist to escape full liability for his illegal actions and would deny compensation to certain of his victims, merely because he happens to deal with foreign customers.

Id. at 314-15. If the word "nonbusiness" is substituted for the word "foreign," this analysis describes some of the policy problems involved in denying nonbusiness consumers the right to sue. Such a denial would defeat the purposes of the antitrust laws and would permit a violator to keep his ill-gotten gains at the expense of his victims.

States and nonbusiness consumers have actively assisted in the enforcement of the federal antitrust laws. The *amici* States have brought numerous governmental-body class actions seeking damages for goods purchased by governmental entities (i.e., for states and governmental entities as consumer(s) in the market place).[18] *Amici* States have also maintained treble-damage suits on behalf of their citizen, nonbusiness consumers.[19] The Eighth Circuit's requirement that a plaintiff must establish "commercial or competitive injury" in order to have section 4 standing clouds the *amici* States' ability to maintain

[18] *See, e.g., In re* Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); *In re* Ampicillin Antitrust Litigation, 55 F.R.D. 269 (D.D.C. 1972); *In re* Fine Paper Antitrust Litigation, M.D.L. No. 323 (E.D. Pa., consol. Mar. 3, 1978); *In re* Cement & Concrete Antitrust Litigation, M.D.L. No. 296 (D. Ariz, consol. Sept. 12, 1977); *In re* Rebar Antitrust Cases, No. C-75-767-M (W.D. Wash., filed Nov. 3, 1975); *In re* Sugar Antitrust Litigation, M.D.L. No. 201 (N.D. Cal., consol. June 2, 1975); *In re* Master Key Antitrust Litigation, M.D.L. No. 45 (D. Conn., consol. Jan. 14, 1971).

[19] *See, e.g.*, California v. B.F. Goodrich Co., No. 78-2263WAI (N.D. Cal., filed Sept. 22 1978); Colorado v. Valley Petroleum Co., No. 77-W-352 (D. Colo., filed Apr. 12, 1977); *In re* Petroleum Prods. Antitrust Litigation, M.D.L. No. 150 (C.D. Cal., consol. Aug. 31, 1976); *In re* Antibiotic Antitrust Actions, M.D.L. No. 10 (S.D.N.Y., consol. Oct. 21, 1968).

these federal treble-damage actions. This in turn frustrates the policies of deterring violators and depriving them of the "fruits of their illegality," and compensating victims of antitrust violations for their injuries.

Contrary to the traditional formulations of the scope and purpose of the antitrust laws, the court of appeals' decision reduces antitrust standing to an inquiry into the status and purposes of the injured party. For example, if the plaintiff in this case had purchased a hearing aid because she needed it both to work as a stenographer and to use at home, would the purchase have been for a business or a nonbusiness purpose? Would she be a business or a nonbusiness purchaser? According to the Eighth Circuit, if price-fixed goods are used for business purposes, actionable injury exists; if the goods are used for nonbusiness purposes, the injury is not recognized by our national economic policy and the overcharged purchaser is left without remedy. The pivotal inquiry becomes "did the plaintiff purchase the product or service for a business purpose" instead of the statutorily required inquiry of whether the plaintiff was "injured in his business or property." The elaborate and tangential inquiry required to determine if a product was used for a business or a nonbusiness purpose would frustrate antitrust enforcement and this Court's desire to keep "already protracted treble-damage proceedings" as simple as possible. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 (1977). It would also conflict with this Court's desire "not [to] add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws." *Radovich v. National Football League*, 352 U.S. 445, 454 (1957).

"As a charter of freedom, [the antitrust laws have] a generality and adaptability comparable to that found to be desir-

able in constitutional provisions." *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-60 (1933). The antitrust laws must be interpreted broadly, adapting to the changes in American Society. Purchases by consumers for nonbusiness uses today represent a crucial part of the commerce of this country and a driving force of our economy. If the antitrust laws are to exercise meaningful control over the functioning of our economy, the "business or property" language of the Act must be interpreted to grant nonbusiness consumers standing to sue antitrust violators.

V. DENIAL OF STANDING TO NONBUSINESS CONSUMERS MAY AFFECT THE *PARENS PATRIAE* AUTHORITY GRANTED TO STATE ATTORNEYS GENERAL.

Amici States are uniquely interested in this litigation because the court of appeals' decision may affect the *parens patriae* authority recently granted to them by Congress. Title III of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 15c-h (1976), empowers state attorneys general to bring civil damage actions on behalf of natural persons[20] injured in their property by an antitrust violation.

The Eighth Circuit decision is apparently based, in part, on the belief that *parens patriae* actions "will effectively protect the interests of consumers." 579 F.2d at 1086. If the decision of Eighth Circuit is affirmed, this view cannot be supported unless this Court interprets the *parens patriae* provisions to create a *new* cause of action in addition to simply creating a

[20] The class of persons protected by the *parens patriae* provisions of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 are "natural persons," excluding "proprietorships or partnerships," 15 U.S.C. § 15g(3) (1976), in essence nonbusiness consumers, the class denied standing by the Eighth Circuit.

more effective procedure for aggregating and litigating existing claims.[21] While this Court has recently suggested in dictum, relying on the House Report, that Congress intended *parens patriae* authority to be procedural only,[22] the Senate viewed the Act as creating a new cause of action.[23] The *amici*

[21] If the decision of the Eighth Circuit is affirmed, nonbusiness consumers will not have preexisting rights of recovery under section 4. Thus, if *amici* States' *parens* authority is interpreted to be entirely procedural, *amici* States will not be able to sue as *parens patriae* on behalf of nonbusiness consumers.

[22] In Illinois Brick Co v. Illinois, 431 U.S. 720, 734 n.14 (1977), this Court, relying on H.R. Rep. No. 499, 94th Cong., 2d. Sess. (1976), stated that:

> Congress made clear, however, that [the *parens patriae* provisions] did not alter the definition of which overcharged persons were injured within the meaning of § 4. It simply created a new procedural device — *parens patriae* actions by States on behalf of their citizens — to enforce existing rights of recovery under § 4.

[23] While this Court cited the House Report in *Illinois Brick*, it was the Senate version of the legislation which was enacted. The Senate Judiciary Report viewed the *parens patriae* provisions as creating "a new statutory cause of action for States. . . . to recover monetary and other relief, whenever [they can] show that a defendant's Sherman Act violation caused damage to the natural persons residing in such State[s]." S. Rep. No. 803, 94th Cong., 2d Sess. 42 (1976). Statements made by the bill's principal author, Senator Hart, during the Senate debate on the compromise version (Byrd motion) which was subsequently enacted, indicate that a new cause of action was intended. After noting that "[t]he original House-passed bill purported to be entirely procedural" and "[t]he original Senate-passed bill created a separate cause of action," Senator Hart stated that:

> The Byrd motion adopts the basic Senate approach, but contains some changes in the language in order to satisfy some of the concerns of the House sponsors. The effect and intention of this provision is the same as contained in S. Rep. No. 94-803. State attorneys general are authorized to bring suits for violations of the Sherman Act, in the name of the State as parens patriae, in effect as trustees for the residents of the State. A *direct cause of action is granted to States* to avoid the inequities and inconsistencies of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 of the FRCP, and the rights of consumers to recover damages under section 4 of the Clayton Act.

122 Cong. Rec. S15,417 (daily ed. Sept. 8, 1976) (emphasis added).

States strongly believe that the better interpretation is that a new cause of action was created.

Regardless of whether the *parens patriae* provisions give the States a separate cause of action, it is clear that the 94th Congress believed consumers already had standing under section 4.[24] Although the views of a later Congress are not controlling as to the intent of an earlier Congress, this Court has recognized their relevance. *Cf. Califano v. Sanders*, 430 U.S. 99, 105-06 (1977) (use of a 1976 amendment to demonstrate the understanding of Congress concerning the intent of a 1948 statute).

If this Court interprets section 4 to deny standing to non-business consumers, it will contradict a nearly unanimous line of cases and will frustrate the desires of the Congresses which enacted the Sherman Act, the Clayton Act, and the Hart-Scott-Rodino Antitrust Improvements Act of 1976.

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[24] Both the House and Senate Reports make it clear that the intent of the bill was to redress a "legislative omission" by providing individual consumers with a *practical* means for recovering damages suffered.

> Under § 4 of the Clayton Act, any person, *including any consumer*, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action. In most instances, however, an individual law suit by an injured consumer is, as a practical matter, out of the question.

H.R. Rep. No. 499, 94th Cong., 2d Sess. 6 (1976) (emphasis added). *Accord*, S. Rep. No. 803, 94th Cong., 2d Sess. 39-43 (1976).

CONCLUSION

The judgment of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Solicitor General
ALAN H. MACLIN
Chief, Antitrust Division
STEPHEN P. KILGRIFF
Special Assistant
Attorney General
THOMAS KENYON
Special Assistant
Attorney General
720 American Center Bldg.
St. Paul, Minnesota 55101

JOHN ASCHROFT
Attorney General
State of Missouri
ROGER N. BERN
Chief Counsel
Antitrust Division
WALTER O. THEISS
Assistant Attorney General
Supreme Court Bldg.
Jefferson City, Missouri
65101

Attorneys for Amici

(Additional List of Counsel on Inside Cover)